

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11060; Ruling Date: October 19, 2017; Ruling No. 2018-4612; Agency: Department of Behavioral Health and Developmental Services; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health & Developmental Services
Ruling Number 2018-4612
October 19, 2017

The grievant has requested that the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11060. For the reasons set forth below, EEDR has no basis to disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 11060 are as follows:¹

Agency witness [Human Resource Manager] testified that as Human Resource Manager she consulted with Grievant’s supervisor and the Central Office before terminating Grievant as a housekeeper.

The witness referenced Agency Exhibit 3 Employee Work Profile page 5, item C. Attendance and Use of State Time which states “The employee shall be in accordance with all policies and procedures. Standards of Conduct are enforceable in regards to the severity of the incident and may override the below standard...”. She testified that the Grievant did not report to work as scheduled on May 4, 2017, May 5, 2017 and May 8, 2017. She testified that the Grievant’s absences were without authorization and with no prior notice or notice to the Agency on the days of absence. She testified that such absences were a violation of Agency Policy 1.60 Standards of Conduct.

In addition, she testified that the Grievant’s absence from work had a significant negative impact on the mission of the Agency. The witness cited Agency Exhibit 3 Hospital Instruction No. 3050 regarding the procedures applicable to attendance and hours of work. In addition, the witness testified that the Grievant’s violations constituted a Group III offense as set out in the Standards of Conduct, Attachment A which lists as an example “Absence in excess of three work days without authorization...”. Attachment A further states that a first offense of such a Group III offense results in written notice and

¹ Decision of Hearing Officer, Case No. 11060 (“Hearing Decision”), August 22, 2017 at 2-4.

discharge. It also states that in lieu of discharge, the Agency may: (1) Suspend without pay for up to thirty work days, and/or (2) demote or transfer with disciplinary salary action.

In response to Grievant's claim that she was absent due to disability, the witness referred to Agency Exhibit 3 Policy No. 4.57 Virginia Sickness and Disability Program page 29 which states that an employee may be denied disability benefits if the "Employees fail to comply or cooperate with requirements of the TPA for administering VSDP". The witness went on to testify that Policy No. 4.57 requires the employee (at page 32 of Policy No. 4.57) to "Contact the TPA regarding illness/disability as soon as possible or within 14 days of disability in order to receive full retro payment if approved."

[Human Resource Manager] further testified that the Grievant did not give the timely notices required by policy, that the Grievant was responsible for knowing the requirements and that the Grievant should have been familiar with the procedures since she had been through the disability benefits procedure in 2016.

[Human Resource Manager] also pointed out that the Grievant's short-term disability claim was denied for the period 4-4-2017 to 5-3-2017 by letter dated May 4, 2017.

Agency witness [Employee Relations Manager], testified that the Agency has been consistent on terminating other employees who violated that same policy provision as the Grievant.

[Grievant's Supervisor] testified that he supported the action to terminate the Grievant.

The Grievant testified that she was not familiar with the procedure for applying for disability benefits because her claim in 2016 was handled by [a former employee] who is no longer employed by the Agency. The Grievant further explained what happened in this regard at Agency Exhibit 2 by her email dated May 8, 2017. In the email, the Grievant explains that on April 25, 2017 she received a message from a co-worker that she had been made aware from payroll that I (the Grievant) had been placed on "lost time" and that I need to contact Human Resources. The Grievant explained in the email that she contacted human resources that day and said that she was not aware of her short-term disability claim status and that no one from human resources had contacted her.

The Grievant also testified that she believed the termination was actually retaliation due to her other complaints and grievances related to the Agency denying her applications for employment in other positions with the Agency.

The grievant timely grieved her termination from employment and a hearing was held on August 10, 2017.² On August 22, 2017, the hearing officer issued a decision upholding the disciplinary action and subsequent termination of the grievant.³ The grievant has now requested administrative review of the hearing officer's decision.

DISCUSSION

By statute, EEDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure”⁴ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁵

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review essentially challenges the hearing officer's findings of fact and determinations based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁶ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁷ Further, in cases involving discipline, the hearing officer reviews the evidence *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.⁸ Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.⁹ Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In this instance, the grievant essentially argues that the agency did not prove by a preponderance of the evidence that her termination was warranted and appropriate given the circumstances of her case. In support of this assertion, she argues that the agency acted in retaliation when it issued the disciplinary action, allegedly due to a FOIA request she initiated,

² *Id.* at 1.

³ *Id.* at 5-6.

⁴ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁵ See *Grievance Procedure Manual* § 6.4(3).

⁶ Va. Code § 2.2-3005.1(C).

⁷ *Grievance Procedure Manual* § 5.9.

⁸ *Rules for Conducting Grievance Hearings* § VI(B).

⁹ *Grievance Procedure Manual* § 5.8.

and her subsequent complaints about the agency's human resource personnel regarding their response to her request.¹⁰

Based on a review of the testimony at hearing and the record evidence, there is sufficient evidence to support the hearing officer's findings in this matter. The hearing officer found that it was "not in dispute" that the grievant failed to report to work on May 4, May 5, and May 8, 2017, and did not notify the agency prior to her absence.¹¹ The hearing decision further states that the grievant "became aware or upon reasonable inquiry should have become aware that she was expected to return to work on May 4, 2017."¹² Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. EEDR has reviewed the record in its entirety and finds that there is evidence in the record to support the hearing officer's determination that the agency met its burden of proof to show that the grievant's termination was proper.¹³

EEDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.¹⁴ In his hearing decision, the hearing officer found that the agency presented sufficient evidence to support the issuance of a Group III offense for the grievant's conduct as alleged by the agency.¹⁵ Because the hearing officer's findings are based upon evidence in the record and the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, we decline to disturb the decision on this basis.

Exclusion of Exhibits

The grievant's request for administrative review also asserts that the hearing officer erred by not allowing her exhibit notebook into evidence. Upon the grievant's attempts to introduce her exhibits at the hearing, the hearing officer questioned the grievant as to whether she had delivered those documents to the agency by August 3, 2017, the date agreed upon by the parties.¹⁶ The grievant admitted that she had not done so, and the hearing officer ultimately determined that he would not admit the exhibits into evidence because they had not been

¹⁰ See also Hearing Recording at 1:13:24-1:14:21.

¹¹ Hearing Decision at 5.

¹² *Id.*

¹³ This ruling does not address any potential issues arising under the Americans with Disabilities Act or the Family and Medical Leave Act, to the extent applicable to these facts, as there do not appear to be any such claims alleged in the grievance or at the hearing. Even if there is indication that such a claim could be addressed in this case, there is insufficient evidence in the hearing record for a definitive determination one way or the other.

¹⁴ See, e.g., EDR Ruling Nos. 2013-3390, 2013-3402; EDR Ruling No. 2012-3186.

¹⁵ Hearing Decision at 5-6.

¹⁶ See Hearing Recording at 00:54-1:07; 1:11:51-1:13:08.

provided to the agency prior to the deadline for the parties to exchange copies of their exhibits.¹⁷ The grievant did not object to the hearing officer's ruling at that time.¹⁸

Receiving probative evidence is squarely within the purview of the hearing officer.¹⁹ Under the *Grievance Procedure Manual*, a hearing officer has the authority to rule on procedural matters, render written decisions and provide appropriate relief, and take any other actions as necessary or specified in the grievance procedure.²⁰ To this end, the hearing officer has the authority to require the parties to exchange a list of witnesses and documents in advance of the hearing.²¹ An action taken by a hearing officer in the exercise of his or her authority to determine procedural matters will only be disturbed where it constitutes an abuse of discretion.²² In this instance, a review of the record indicates that there was no dispute that the proposed exhibits had not been provided to the agency by the deadline established by the hearing officer.²³ Under the *Rules for Conducting Grievance Hearings*, the hearing officer may exclude evidence not timely exchanged consistent with the hearing officer's orders.²⁴ Thus, while the *Rules for Conducting Grievance Hearings* may anticipate a more liberal admission of evidence by the hearing officer, nevertheless, we cannot conclude that the hearing officer exceeded his authority in refusing to admit the exhibits into evidence in this case.

Newly Discovered Evidence

The grievant has also submitted additional information to EEDR which she requests be considered as part of EEDR's administrative review. Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence."²⁵ Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.²⁶ The party claiming evidence was "newly discovered" must show that

(1) the evidence was newly discovered since the judgment was entered; (2) due diligence...to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.²⁷

¹⁷ *Id.*; see Hearing Decision at 1.

¹⁸ See Hearing Recording at 00:54-1:07; 1:11:51-1:13:08.

¹⁹ Va. Code § 2.2-3005(C).

²⁰ *Grievance Procedure Manual* § 5.7; see also Va. Code § 2.2-3005.

²¹ *Grievance Procedure Manual* § 5.7(2).

²² See, e.g., EDR Ruling No. 2014-3777; EDR Ruling No. 2005-1037; EDR Ruling No. 2004-934.

²³ See Hearing Recording at 1:11:51-1:13:08.

²⁴ *Rules for Conducting Grievance Hearings* § IV(D).

²⁵ Cf. *Mundy v. Commonwealth*, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); see EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of grievance procedure).

²⁶ See *Boryan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989).

²⁷ *Id.* (emphasis added) (quoting *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987)).

Here, the grievant has provided no information to support a contention that the additional documentation should be considered newly discovered evidence under this standard. It appears the grievant had the ability to obtain this evidence prior to the hearing. In fact, it appears that at least some of the information may have been included in the grievant's proposed exhibit binder which was excluded by the hearing officer, as discussed above. As the grievant already had the opportunity at the hearing to submit this evidence in support of her position, there is no basis for EEDR to reopen or remand the hearing for consideration of this additional evidence.

CONCLUSION AND APPEAL RIGHTS

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.²⁸ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.²⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁰



Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

²⁸ *Grievance Procedure Manual* § 7.2(d).

²⁹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁰ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).